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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

ALBERT HOWLETT,
Petitioner,

VS.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS *AMICUS CURIAE* *In Support of Respondent*

GRAYDON S. STARING
Counsel of Record
Two Embarcadero Center,
Suite 2600
San Francisco, California 94111
Telephone: (415) 984-8200

JOHN A. FLYNN
580 California Street, Suite 1750
San Francisco, California 94104
Telephone: (415) 693-5566
Attorneys for Amicus Curiae American Institute of Merchant Shipping

FLYNN, DELICH & WISE
LILLICK & CHARLES
Of Counsel

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

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In Support of Respondent

INTEREST OF THE AMERICAN INSTITUTE OF MERCHANT SHIPPING

Amicus curiae, American Institute of Merchant Shipping, referred to as AIMS, formed in 1969, is the nation's largest association of American shipowners and consists of 24 companies whose operations are world-wide.[1] They are

[1] Amerada Hess Corporation, American Overseas Marine Corporation, American President Lines, Amoco Transport Company, Arco Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron Shipping Company, Coscol Marine Corporation, Crowley Maritime Corporation, Exxon Shipping Company, Farrell Lines Incorporated, Hvide Shipping Incorporated, Interocean Management Corporation, Maersk Line, Lim-

representative of all steamship companies that do business in the United States and are exposed as third parties to injury claims by longshoremen and harbor workers, and engaged in litigation of such claims.

This case presents an important conflict concerning the relative responsibilities of stevedores and shipowners and their insurers for the ultimate burden of compensation, under the 1972 Amendments to the Act and this Court's interpretation of it in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). The losses reflected in this and similar cases are burdens of the shipping industry as a whole that ultimately come to a focus in the freight rates paid by shippers. AIMS believes that the interests of all concerned are best served by rules distributing those losses to the industrial entities involved, not on a merely conceptual basis, but by clear, simple and practical rules that operate with a maximum of economy and a minimum of dispute within the industry. They are concerned that Petitioner here would have the Court move sharply in the other direction.

The 1972 Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoreman and vessel or between vessel and stevedore, and, consistently with that aim, provided dramatic and much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. Members of AIMS pay the premiums for such insurance, so far as those premiums are attributable to work on their own vessels, as a distinct element of the rates they pay their stevedore contractors.

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ited, Maritrans GP Inc., Mobil Oil Corporation, Mormac Marine Transport, Inc., OMI Corp., OSG Bulk Ships, Inc., Phillips Petroleum Company, Sea-Land Service, Inc., Sun Transport, Inc., Texaco, and Unocal Corporation.

AIMS and its members remain keenly interested in interpretations of the Act that further the broad purposes of the 1972 Amendments, by providing longshoremen with the ample benefits and long-term security that the Act provides, unburdened by a heavy overlay of attorneys' fees; by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating costly and confusing problems in the administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably resolved in consonance with the overall aims of the Amendments and the distribution of loss to those generally best situated to control and compensate it.

The central issue in *Scindia* was whether shipowners were obliged to supervise the work of stevedores and other waterfront contractors, to prevent injuries to American longshore and harbor workers. Upon that question depended whether the shipping industry, including its shoreside auxiliaries, would have a practical working rule for distributing injury losses among its entities and their insurers. This Court decided that issue in a thoughtful, general and practical way that has been famously effective in securing liberal compensation for injuries, while drastically reducing litigation to determine who should pay it.

As we will show, Petitioner here seeks an exception to the rule of *Scindia* broad enough to affect almost all discharges of cargo in the United States, more than half of all stevedore operations here, an exception that would devour the rule in discharge operations. We propose to show that the *Scindia* rule remains sound and practical and that the reported deviations from it are not supported by principle.

POTENTIAL SCOPE AND IMPACT OF THIS CASE

The rule advocated by Petitioner, and embraced by the Ninth Circuit, threatens to impinge upon more than half the loading and discharge operations in the United States. This

is so because it would affect the discharge of cargo loaded abroad, which is to say, imports. In 1991, the latest year for which the figures are shown, the total of imports to all four coasts of the United States was 455,000,000 tons, while the total of exports was 394,000,000 tons.[2] Loadings and discharges of domestic cargoes are equal, by definition. Thus Petitioner's proposal would not be an exception for exceptional cases, but the prevailing rule in its operational and financial impact, contrary to what the industry has understood since 1972 and considered confirmed by this Court in 1981, and to which the economic relations of its carrying and waterfront segments and their insurers are long and presently adjusted.

One of the important aims of the 1972 Amendments was the reduction of litigation to fix economic responsibility for longshore and harborworker injury losses. This required a reading of the Act that would stabilize doctrine and make it possible to answer most legal questions involved without the aid of the courts. The *Scindia* doctrine, as applied in most of the country without an "exception" for loading stevedores, has accomplished this to a high degree, as indicated by the decline in reported controversies between vessels and waterfront employers and employees arising in third-party suits under the Act.[3] Departure from that doctrine and adoption

[2] Statistical Abstract of the United States 1993, 644, Table 1080.

[3] A rough but adequate view of the trend can be had by tallying such cases in the federal courts, annually at five-year intervals from 1971, the year before the 1972 Amendments and ten years before *Scindia*, to 1991, ten years after *Scindia, as reported in American Maritime Cases (digested under PERSONAL INJURY 1312-13149 and LONGSHOREMEN'S ACT 19)*. In 1971, there was one case in the Supreme Court and there were 20 in the courts of appeals. In 1976, when old cases were not yet all run off and the meaning of the 1972 Amendments was being widely tested, there were 12 in the courts of appeals. In 1981, the year of *Scindia*, there were two in the Supreme Court, including *Scindia*, and 12 in the courts of appeals, including remands from the Supreme Court following *Scindia*. In 1986, the limits of *Scindia* were still being explored and there were 12 cases in the courts of appeals. In 1991, there were four. The reports of district court cases declined from 37 in 1971 to 7 in 1991. It is a fair assumption that the reported court cases reflect the decline of the much larger total number of cases, most of which do not reach the reports.

of such an "exception" would reverse the trend, produce more litigation in federal courts, and increase the burden of litigation costs on the industry and its customers.

SUMMARY OF ARGUMENT

I.A. In *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981), this Court held that a shipowner's duty under the Act did not require vessel supervision or inspection of stevedores during their cargo operations. The scope of this rule extends to each instance of stevedore cargo operations, and includes the loading of cargo in a foreign as well as a domestic port.

I.B. The shipowner's general turnover duty set forth in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969) was reaffirmed in *Scindia*. This general turnover duty is an integrated standard, not subject to separate duties based upon the perceived obvious or concealed nature of a particular condition, and includes the vessel's expectation that the expert stevedore will safely and competently perform its cargo operations. Concealment is not a good criterion for shifting responsibility from stevedore to ship, since concealed conditions are revealed in the course of work, so that stevedores clearly have responsibility to deal with them, and questions arise from the time, way and extent that concealment ends and precautions become possible. It would be a great mistake of safety policy to hold that stevedores cease to bear responsibility for a condition that has once been concealed. Such a rule would be a license to relax vigilance by the party primarily responsible for em-

ployee safety and would, in addition, apply to most of the cargo discharged in the seaports of this country, destroying more than half the reach of this Court's rule in *Scindia* and producing windfall recoveries for stevedores, contrary to the allocation Congress intended.

I.C. Petitioner's argument that the turnover duty is breached when a foreign loading stevedore creates a dangerous condition in the cargo stow is based on a restricted interpretation of the central holding of *Scindia*. The limitation is not justified by the breadth of this Court's opinion and is unreasonable since it would nullify for all practical purposes the central rule of *Scindia* that a shipowner is not required to supervise or inspect the stevedore's work. Such a limitation on the *Scindia* rule would also result in vessel liability without fault, expressly abolished by the 1972 Amendments.

II.A In the *Turner* and *Riggs* cases, Ninth Circuit panels, by evading the central ruling in *Scindia* on the extent of the shipowner's duty of supervision, and concentrating on the turnover duty, with its references to reasonable care, in isolation, imposed on the shipowner a supervisory duty over cargo stowage. They have declared *Scindia* limited to its facts, and therefore concerned only with the duty to intervene in case of danger to a longshoreman loading cargo in a domestic port. Considering what this Court had before it in *Scindia*, and the breadth of its statement of the rule, that was not a fair appraisal. To make the desired use of the turnover duty, the Ninth Circuit panels bifurcated it into unrelated duties of condition and warning, so as to be able to declare that the shipowner had a duty to prevent conditions of which it explicitly did not have a duty to warn, a most implausible conclusion. They have aggravated this interpretation by interpreting the "work space" referred to in *Scindia* as including the cargo, and accomplished this by a strange interpretation of an earlier case of their own.

It was well established before *Scindia* that stevedores should suspend work at times until corrective measures were taken. This proposition was misinterpreted in the Ninth Circuit to be an assertion by the shipowner of the common law defenses of assumption of risk and contributory negligence, which are not available as against the longshoreman. It thereby confused the relationship of the vessel and the stevedore and its lack of relationship with the stevedore's employees. It also confused the concept of duty with that of defenses to performance where duty is established, and assumed that a longshoreman is without remedy where the shipowner has no affirmative duty, failing to recognize the longshoreman's liberal compensation rights and the Act's allocation of risk and loss within the industry.

II.B. The Ninth Circuit panels have falsely assumed that the shipowner can protect itself against bad stowage abroad by selection of the stevedore, or by supervising the stevedore "when necessary". These assumptions, made on no evidence at all, overlook that shipowners often have no choice of stevedores abroad, and that, to supervise them "when necessary," would be to supervise them all the time in order to learn when it was necessary. The panels have further assumed, with no evidence at all, the implausible general conclusion that foreign stevedores can be effectively sued for indemnity under their laws and tariffs. They also resort to flimsy evidence of custom, contrary to its legal definition as presumably meant by this Court in *Scindia*. The *Turner* panel desired not to leave the longshoreman "to the mercies of foreign stevedores", disregarding that the longshoreman, if he does not recover against the vessel, is not cast upon charity or chance, but has the security of liberal compensation, the cost of which is borne, as intended, by his employer.

II.C. The Longshore Act is one of many legal and contractual systems that depend in large part upon risk allocation in

advance, rather than largely upon fault-based litigation. In advancing that pattern, this Court, in *Scindia*, established a practical division of responsibility between the stevedoring segment and carrying segment of the industry. The general rule by which this was done should not be overturned to suit the facts of a particular case. To do so would frustrate the purpose of a rule of allocation by creating uncertainty and promoting litigation. The Ninth Circuit has done just that, by first carving out an exception to the rule for "concealed" hazards, justifying it by their concealment, and then holding that the same principles require spreading the exception to open and obvious hazards, ignoring that the exception had its basis in concealment. The rule Petitioner seeks would apply to most of the cargo discharged in this country and introduce great confusion of economic, as well as operational, responsibility, implicating the concern expressed in *Scindia* about windfall recoveries of stevedores through third-party suits.

III. While the fundamental rule of *Scindia* applies to loading and unloading and to all ports, that does not mean that a vessel may not have any duty with regard to a condition of cargo stowage, but such a duty will only arise if the vessel has actual knowledge of a cargo hazard it cannot expect the expert stevedore, on whom the vessel is entitled to rely, to discover and take precautions against. Absent evidence that the shipowner in this case knew of the use of the plastic under the cargo and that it presented a hazard in the face of which the discharging stevedore could not "carry on its operations with reasonable safety," the judgment below should be affirmed.

ARGUMENT

I. UNDER *SCINDIA*, A SHIPOWNER'S DUTY TO A LONGSHOREMAN EMPLOYED IN DISCHARGING CARGO DOES NOT INCLUDE SUPERVISION OR INSPECTION OF THE STEVEDORE OPERATIONS IN LOADING THE CARGO.

A. The Central Rule of *Scindia* Recognizes No Duty on the Vessel to Supervise or Inspect the Stevedore's Loading or Unloading Operations.

In *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981) this Court addressed the scope of a shipowner's duty and the standard of care owed to a longshoreman under the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b). Although this Court recognized a different vessel duty for dangerous conditions existing before the commencement of stevedore work and for conditions arising thereafter, the central issue decided was whether the shipowner had a duty to supervise or inspect the stevedore cargo operations. Relying upon earlier Supreme Court decisions and the intendments of the 1972 Act, and after considering a large number of earlier federal court decisions under the Act, this Court held that, once the stevedore's cargo operations have begun, a shipowner has:

> "no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore . . . [T]he shipowner within limits, is entitled to rely on the stevedore and owes no duty to the longshoreman to inspect or supervise the cargo operations." *Id.* at 172.

A narrow exception, not involved in this case, was recognized for dangerous conditions arising from a defect in ship's gear. If the vessel knows of the defect, and knows that the

stevedore's employees are continuing to use the defective gear despite the dangers, the ship may, under certain circumstances, have a duty to intervene. *Id.* at 175-176.

In establishing this rule, the Court recognized that to impose a continuing duty on the vessel to inspect or supervise to discover dangerous conditions would result in holding the ship solely liable for breach of a warranty of seaworthiness or other non-delegable duty, which the amended Act expressly eliminated. *Id.* at 169. Although the 1972 Amendments insulated the stevedore from indemnity liability to the vessel, the *Scindia* decision validated the principles underlying this Court's earlier decisions in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) and *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). Thus, the 1972 amendments did not disturb the stevedore's implied warranty that it would perform its services in a workmanlike manner or the vessel's justifiable expectation that the stevedore contractor would safely and competently perform its services. 451 U.S. at 172.

This Court found reasons for not imposing a duty on the ship to supervise or inspect in the provision of the Act (33 U.S.C. § 941) which requires the stevedore to provide a reasonably safe place to work. Thus, "within limits, the shipowner may rely on the stevedore to avoid exposing the longshoreman to unreasonable hazards." *Id.* at 170.

B. The Shipowner's General Duty in Turning Over Its Vessel to the Stevedore, Set Forth in *Federal Marine Terminals v. Burnside Shipping Co.* and Reaffirmed in *Scindia*, Does Not Consist of Separate and Independent Duties of "Safe Condition" and "Warning" but Is Based on an Integrated Standard Limited in Scope by the Stevedore's Warranty of Competent and Safe Performance.

In defining the shipowner's duty to a longshoreman for vessel conditions existing before the commencement of stevedore cargo operations, this Court expressly adopted its earlier decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). *Burnside* held that the vessel owes to longshoremen a duty of "due care under the circumstances", more particularly defined as follows:

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. *Id.* at 416 n. 18. *Scindia*, 451 U.S. at 166-7.

This turnover duty, reaffirmed in *Scindia*, was expressly based on the opinion in *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601, *aff'd and adopted*, 274 F. 2d 875 (9th Cir. 1960). 394 U.S. at 416 n. 18. The *Hugev* opinion analyzed the circumstances surrounding the steve-

dore's performance of services on the vessel and formulated the shipowner's duties in light of the law and those circumstances, among them the circumstance that the stevedore contractor holds itself out to be the expert in loading and unloading the cargo. As the expert, the stevedore warrants that it will perform its services in a competent, workmanlike manner and with reasonable safety to persons and property. 170 F. Supp. at 608, citing *Ryan*, 350 U.S. at 134 and *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 565 (1958). As the court recognized in *Hugev*:

> In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. . . . Almost always, she has ridden some heavy seas. . . . Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts of the world. . . .
>
> It is reasonable to expect then that . . . she may well be a place of danger even as she docks. . . .
>
> The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner must normally pay for standby time.
>
> Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. . . . So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which . . . [is] even in a reasonably safe condition. . . . 170 F. Supp. at 609-610.

These circumstances provide the essential foundation for defining the ship's turnover duty as this Court did. The *Burnside* duty, reaffirmed in *Scindia*, incorporates these implied-in-fact obligations of the stevedore based on his expertise, and the rightful expectation that the stevedore will properly and safely perform its work mindful of the possible dangers aboard the vessel. Thus, under *Burnside*, the vessel is not duty-bound to turn over a vessel which is, in all respects, safe. The vessel is, within limits, entitled to rely on the expertise, competency and safety of the stevedore.

This Court's restatement of the *Burnside* turnover duty in *Scindia* was limited to the physical condition of the ship, her gear, equipment and "work space to be used in the stevedoring operation." 451 U.S. at 167. Neither *Scindia* nor *Burnside* included the cargo stowage in defining the vessel's duty. This Court's reference to "work space" was logically understood by shipowners to mean the ship's decks, walkways, platforms and other structural features on or about which the longshoremen perform their work, as the Third Circuit agreed, in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490, 495 (3d Cir. 1987).

The Ninth Circuit, however, has expanded the *Burnside* turnover duty by interpreting "work space" to include the cargo stowage. *Riggs v. Scindia Steam Navigation Co., Ltd.*, 8 F.3d 1442 at 1445 n. 5 (9th Cir. 1993). The structural aspects of a ship, including her decks, walkways, platforms and cargo holds are permanent features of the ship on which stevedore's employees perform their work. Cargoes are infinite in form, size and character. The stowage of cargoes is temporary. Stowage factors will change at each port of call through the cargo operations of the stevedore. The inclusion of cargo within the ship's "work space" for purposes of the *Burnside* turnover duty is not justified as a matter of principle, since it contradicts the rule of *Scindia* that the vessel need not supervise or inspect the stevedore's operations.

The reaffirmation in *Scindia* of the *Burnside* rule has been mistakenly interpreted, most notably by the Ninth Circuit, as two separate duties. In *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir. 1989), the duty was characterized as consisting of both a "turnover duty of safe condition" and a "turnover duty to warn". Under this interpretation, a hidden danger may raise a duty to warn, while an open and obvious danger does not, but invokes the vessel's "duty of safe condition."

This treatment of the *Burnside* duty produces illogical results. The shipowner is put under a duty to correct an obvious danger for which it has no duty to warn. *Martinez v. Korea Shipping Corp.*, 903 F.2d 606 (9th Cir. 1990). An obvious danger may carry its own warning. *Ludwig v. Pan Ocean Shipping Co. Ltd.*, 941 F.2d 849, 851 (9th Cir. 1991). The obvious condition may not, however, be susceptible to a ready correction, as in *Riggs v. Scindia Steam Navigation Company*, 8 F. 3d 1442 (9 Cir. 1993), where the steel pipe stow was said to be in obvious disarray. The result in *Martinez* and *Riggs* is vessel liability for what actually represents the functional equivalent of unseaworthiness liability prohibited by the 1972 Amendments.

Properly read, the *Burnside* rule is not two separate duties. The rule is to be read altogether. The reference in *Burnside* and *Scindia* to a duty to warn, when read with the *Hugev* opinion, is simply a recognition of circumstances under which a warning by the vessel is required and sufficient in place of preventing or remedying the condition.

In this case, where the evidence does not indicate a warning by the ship, the criterion under the two-duty rule, as proposed by Petitioner, is whether the use of plastic sheeting represented a "hidden" or "obvious" condition, without regard to the expectation that the stevedore could cope with it. This approach misses the point. The fundamental question is whether, under the statutory allocation of risks, the

ship can rely on the expert stevedore to discharge the cargo with reasonable safety. The duty of the stevedore contractor is not limited to the handling of the cargo but includes the duty to suspend work and avoid injury to their employees whenever it would be unsafe to proceed. *Hugev*, 170 F. Supp. at 608, 610 and cases cited.

Concealment as the criterion for shifting responsibility from stevedore to ship opens a spectrum of uncertainties. Certainly a stevedore who actually discovers, in the course of work, a potential hazard that was earlier concealed, has defined responsibilities for it. Short of that, there are questions of risk allocation which, if opened wide, will provide a fruitful field of litigation of subjective issues that have been largely foreclosed since the 1972 Amendments, and risk the imposition of liability without fault on the vessel. It would be a great mistake of safety policy to tell stevedores they need not exercise keen vigilance for unseen dangers and to reimburse them for the consequences. Then, indeed, such a "rule of shipowner liability will skew the statutory scheme in a way Congress could not have intended." *Scindia*, 451 U.S. at 181 n. 2 (Powell, J. and Rehnquist, J., concurring).[4]

The turnover duty of *Burnside*, read together with *Scindia*'s rule placing no duty on the ship to inspect or supervise the work, substantially parallels the settled principles of land-based law expressed in the Restatement (Second) of the Law of Torts, §§ 343 and 343A. Although this Court noted in *Scindia* that these sections "while not irrele-

[4] The concurring opinion in *Scindia* by Justice Powell, with the concurrence of Justice Rehnquist, as he then was, aptly points out the dangers stemming from a failure to articulate a vessel standard of care which allocates responsibility between the shipowner and stevedore. Negligent stevedores will receive windfall recoveries of statutory compensation benefits and the shipowner will be held responsible for all damages. This removes the incentive of the stevedore to provide a safe work environment. 451 U.S. at 181.

vant, do not furnish sure guidance in cases such as this", Amicus submits that, in particularizing the shipowner's duty in relation to stevedoring, the "sure[er]" guidance was achieved. 451 U.S. at 168 n. 14. See concurring opinion by Justice Powell interpreting the Court's ruling as consistent with these Restatement standards. *Id.* at 180 n. 1.

C. *Scindia*'s Principal Rule Extends to Each Cargo Operation During the Voyage and Otherwise Would Have No Practical Meaning.

Petitioner's argument is based upon a highly restricted interpretation of *Scindia*. Petitioner contends that the principal teaching of *Scindia* — that a shipowner has no duty to supervise or inspect for dangerous conditions arising during stevedore cargo operations — is limited to circumstances where the stevedore-employer has commenced cargo operations. With this limitation read into *Scindia*, Petitioner argues that a shipowner has a heavier burden, including the duty to supervise and inspect during stevedore loading, in a foreign port, a failure of which risks vessel liability to an off-loading longshoreman. Petitioner finds support for his narrow reading of the *Scindia* rule in decisions of the Ninth Circuit. *See Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442 (9th Cir. 1993).

Amicus submits that this Court's decision in *Scindia* was not intended to be so limited and cannot reasonably be so read. When this Court decided *Scindia,* it considered an abundance of lower federal court decisions presenting various interpretations and qualifications of the nature and scope of a vessel's duty under the 1972 Amendments. (See 451 U.S. at 163 nn. 9, 21, 25, identifying some of them). This Court rejected those decisions, at least in part, as inappropriate or inconsistent with the intent of the Act. This Court expressly rejected, as inconsistent with the Act, the argument that a "shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process." 451 U.S. at 169. Had this Court intended to restrict its holding, it would have so stated.

Petitioner's argument would produce the anomalous and unintended result that a shipowner is burdened with a duty vastly more extensive simply because the loading stevedore was foreign. Petitioner's interpretation of *Scindia* is unreasonable since it would, when fully comprehended, nullify the essential rule of *Scindia*. Vessels calling at United States ports are carrying cargoes which, almost always, have been loaded at several foreign ports. Cargo loaded in one foreign port may have been discharged at another foreign port, or at a preceding United States port. At each such intermediate port of call, the vessel's cargo will have been loaded and discharged by stevedores and the stowage will have been altered.

Petitioner's view would require a constant duty on the shipowner to supervise and inspect each loading and discharging stevedore's work at each port of call, including any intermediate foreign or United States ports, to ensure that it had not created a potentially hazardous condition for the longshoremen at the next domestic port. Extending Petitioner's logic to its natural conclusion would require the vessel to supervise and inspect during the cargo discharge by this Petitioner's employer to ensure that its work did not create a potential hazard for longshoremen at the next port. That surely is not what this Court meant when it unequivocally held that a vessel has no general duty to inspect or supervise the activities of the loading or unloading stevedore. Petitioner's argument would impose the very duty on the vessel which this Court rejected in *Scindia*.

II. THE NINTH CIRCUIT OPINIONS IN *TURNER* AND *RIGGS* REPRESENT AN EFFORT TO UNDERMINE THE RULING IN *SCINDIA*.

The conflict that brings this case here is produced by two cases in the Ninth Circuit, and perhaps one in the Fifth, where the extent of conflict is unclear.[5] The Ninth Circuit cases differ not only with the Second and the Third, but directly with *Scindia* itself, with which it professes to be reconciled by an imaginative view that this Court did not really mean what it said there.

In *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), the court upheld a jury verdict for a discharging longshoreman injured when cargo loaded abroad collapsed for lack of support beneath it, a condition that could not be seen at the time of the accident. The holding was based on a perceived duty to prevent the condition by supervising the loading stevedore. 651 F.2d at 1303. The decision was reached by limiting *Scindia* to its facts, bifurcating the turnover duty, crediting a claimed "custom" of supervision,

[5] *Woods v. Sammisa Co.*, 873 F.2d 842 (5th Cir. 1989), where the court was constrained to follow its earlier case, *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), will not be discussed at length here because the Fifth Circuit position is significantly different from that of the Ninth. It is less radical in one respect and possibly more so in another. It does not appear to impose a duty of supervision and inspection on the shipowner. The Fifth Circuit has gone no further in these cases than to raise a duty in the event of actual knowledge. *Woods*, 873 F.2d at 848; *Lemon*, 656 F.2d at 116. In *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 n. 2 (5th Cir. 1984), the court also indicated that evidence of loading by an independent contractor rather than the shipowner would have made a difference. These cases do not present statements equivalent to those found in the Ninth Circuit cases. They make no point of foreign loading and, in *Lemon*, the origin of the cargo is not even mentioned. The Fifth Circuit doctrine therefore appears to apply to domestic cargoes. Thus the Ninth Circuit's claim in *Riggs* (8 F.3d at 1448) that it was joining in the doctrine of the Fifth was incorrect.

stressing the concealed character of the defect, making several unfounded assumptions, and concluding that the shipowner was not protected as to the work of foreign stevedores who were not under the Act.

In *Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442 (9th Cir. 19[illegible]), No. 93-1293 in this Court on Petition for Certiorari, the defect in the cargo loaded abroad was open and obvious. The court, disregarding its earlier reliance on concealment, held that there was no difference in principle, and liability of the shipowner was required by *Turner*, together with a later case having nothing to do with cargo operations.[6]

Both decisions were inconsistent with *Scindia*, and even with each other, in several respects. And it was not true, as the court claimed in *Riggs*, 8 F.3d at 1448, that it had the company of the Fifth Circuit in its holding.[7]

A. The Ninth Circuit Ignores the Holding of *Scindia* and Reads that Case Only to its Own Purposes.

In both *Turner* and *Riggs*, the panels ignored the fact that the central issue in *Scindia* was the general extent of the shipowner's duty of supervision of stevedores.[8] This Court's decision of that issue was that there was no such general duty. 451 U.S. at 172. The Court reviewed related duty issues to place this central ruling in a setting for the

[6] *Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606 (9th Cir. 1990) (vessel equipment condition at time of discharge).

[7] *See* note 5 *supra*.

[8] "The question presented is whether a shipowner's duty of care to longshoremen under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act, 33 U.S.C. section 905(b) requires it to supervise the work of an expert independent stevedore contractor so closely as to be in a position to countermand the stevedore's informed decision regarding the safety of work methods and equipment." Petitioner's Brief in No. 79-512.

guidance of the lower courts, in which there were then many cases on such issues.

The authors of both the *Turner* and *Riggs* opinions cited *Scindia* and evaded it, not confronting its central ruling squarely, but treating it as though it were collateral or incidental. Indeed, in both cases, the evasion extends to stating the intervention rule, rather than the supervision rule to which it is an exception, as the rule of *Scindia*. 651 F.2d at 1303; 8 F.3d at 1446 n. 9. Thus freed of the *Scindia* supervision rule, the court focused instead on the statement of the turnover duty from *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 416 n. 18 (1969). By reading the turnover rule without the *Scindia* ruling on supervision, the references to reasonable care in the turnover rule could be moulded to impose a supervisory duty on the shipowner.

The author of *Turner* delicately acknowledged finding "one decision apparently adopting [a contrary] view." 651 F.2d at 1303. *Ruffino*,[9] the case cited, had done so, not apparently, but clearly and unequivocally. Without extravagant generosity, *Scindia* could also have been mentioned as stating, at least "apparently," a contrary view.

Turner implicitly limited *Scindia* to its facts. 651 F.2d at 1303. *Riggs* did so explicitly. 8 F.3d at 1446. This Court had before it in *Scindia* more than two dozen cases from seven circuits interpreting the scope of the shipowner's duty under the 1972 Amendments, including *Ruffino*, and presenting a wide variety of loading and discharging situations,[10] of which the Court cited a number. No fair reading of *Scindia*, canvassing the subject as it did, could leave the impression

[9] *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977).

[10] Petitioner's Brief in No. 79-512, pp. 18-19 n. 27-29.

that the general rule of business conduct laid down in that case was limited to a discrete fact situation and subject to an exception broader than its remaining application.

The *Riggs* opinion also made explicit, what was implicit in *Turner*, that it would bifurcate the turnover duty of *Federal Marine Terminals*, reiterated in *Scindia*, into unrelated duties of condition and warning: "[*Scindia*] expressly limits the duty to warn to hidden defects but does not place a similar restriction on the duty of safe condition." 8 F.3d at 1448 n. 12. We have explained above why this view misunderstands the turnover duty. The author's result-oriented attitude toward that duty finds expression in unqualified references to the "duty of safe condition," coming to a focus in respectful citation of the flat description of *Turner* in another Ninth Circuit case "as setting forth a vessel's duty 'to make the ship safe for longshoremen before turning the ship over to the stevedore.'" 8 F.3d at 1445. The opinion concludes that "a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones," and, in a footnote to this statement, recognizes only the exception that the defect may not present "an unreasonable danger." 8 F.3d at 1448. This view conflicts with the ruling of this Court that there is no duty to provide a safe place to work, apart from fault,[11] and with the consistent recognition in *Scindia* that the 1972 Amendments rejected "[c]ases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury." 451 U.S. at 168.

The *Riggs* court aggravated its interpretation of the turnover duty by concluding that "work space to be used in the stevedoring operations," (*Scindia*, 451 U.S. at 167) includes the cargo. 8 F.3d at 1445 n. 5. We need not urge a rule

[11] *West v. United States*, 361 U.S. 118, 122-23 (1959).

excluding cargoes from "work space" in all circumstances, but a general rule of inclusion requires supervision of independent contractors to a degree that inherently violates the principle of *Scindia* and the settled principles of terrene law generally expressed in Restatement (Second) of the Law of Torts, §§ 343, 343A, and 409 (1965).

The way the *Riggs* court reached its conclusion about "work space" strikingly illustrates the tendentiousness of its opinion. It relied on *Taylor v. Moram Agencies,* 739 F.2d 1384, 1386 (9th Cir. 1984) where it had affirmed the district court's finding that the cargo stowage had in fact been safe, and actually said: "[t]he scope of the shipowner's duty as set forth in *Scindia* focuses on the character of the ship and its equipment—not on the nature of the cargo." With stunning illogic, the court now says that *Taylor* stood for the inclusion of cargo in the "work space" responsibility of the shipowner because, otherwise, it would not simply have agreed with the facts found below but would have taken an alternative ground of decision that there was no duty! 8 F.3d at 1447.

Scindia was decided against a background of understanding that stevedores could suspend work at times until corrective measures were decided and taken, *Hugev,* 170 F. Supp. at 608, 610, as implied in references to the stevedore's responsibility for avoiding hazards and providing safeguards. *E.g.,* 451 U.S. at 170. The author of *Riggs* adopted the erroneous premise that the shipowner had a relationship with the individual longshoremen, rather than their stevedore employer, as a basis for arguing that the right to stop operations until appropriate precautions are taken involves the defenses of assumption or risk and contributory negligence and is therefore irrelevant. 8 F.3d at 1448. What apparently troubled the court is the difference between known or obvious danger, as a question of a shipowner's duty, and as a basis for comparative negligence. If there is

no duty in respect of known or obvious conditions, there is no basis of possible liability, while comparative negligence would merely reduce the recovery. When the known or obvious condition is involved in the issue of duty, it only superficially resembles the common law doctrines of assumption of the risk and contributory negligence. Where the shipowner does not have the responsibility for the condition, the longshoreman is not left without a recovery, since he enjoys liberal compensation benefits from his employer under the amended Act.

Thus two panels in the Ninth Circuit have sought to carve out a huge "exception" for cargoes loaded in foreign ports. But this Court, in holding that a shipowner is entitled to rely on the stevedore's performing competently, never so much as suggested a chauvinistic limitation of such reliance to American stevedores. 451 U.S. at 171. In *Riggs* the court said it expressed no opinion as to loading by domestic stevedores. 8 F.3d at 1445 n. 6. Had the *Riggs* court considered that issue, it would have been faced with a more serious problem in trying to reconcile its views with *Scindia.*

B. The Ninth Circuit Panels Have Relied on Unfounded Assumptions of Fact and Law, Omissions and Other Fallacies.

In rationalizing the impact of its decision on the shipowner, the *Turner* court says that "[t]he vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore." 651 F.2d at 1304. The court repeated this in *Riggs* (8 F.3d at 1446) and both cases state the further assumption that the shipowner can sue the foreign stevedore for indemnity and thereby motivate it to

safety.[12] It is a wholly unwarranted assumption that the shipowner has a discriminating choice of foreign stevedores; it is unsupported by even a suggestion of fact and takes no account of those ports abroad (as in the United States) where there is only one stevedore, and especially of those where that one is the state, municipality or port authority with a monopoly of the business. To supervise "when necessary" is to know when it is "necessary " and cloaks in bland terms either an assumption of the shipowner's omniscience or a burden of continual and close supervision. And the same is true of the supposed opportunity of warning, which requires knowing, of all dangerous conditions created by the foreign stevedore. As for suits against foreign stevedores, no authority is cited and it requires a great leap of faith to believe that they (especially the public entities) can be sued for indemnity at all in many foreign countries and that their laws and public tariffs include the equivalent of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

This Court said that the basic law that the shipowner had no general duty of supervision could be varied by "custom to the contrary." 451 U.S. at 172. In *Turner* the court found sufficient evidence of such a contrary custom in vaguely described testimony of a "custom in the industry" of oversight, albeit for different purposes than longshore safety. It thereby read this Court, in referring to custom, to mean

[12] The *Turner* court appears to point to foreign stevedores as targets of suits because they do not enjoy the protection of the Act and the favor of Congress, in contradistinction to the American stevedores intended to be protected from indemnity. 651 F.2d at 1304. This notion was fallacious since the law does not specially protect a negligent American loading stevedore that is not the employer of the injured longshoreman. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). Thus no real distinction can be made between shifting the burden to foreign loading stevedores who are not protected by the Act, and to domestic loading stevedores that the court assumes to be protected by it, but are not.

something less than what the law regards as custom, and particularly custom clear enough to override a clear rule of law.[13] The "custom" of inspection, having been found in the one case, was considered unnecessary to be shown again in *Riggs*. With such a view of custom, the basic rule can be overridden in almost any case by a statement, without regard to location, condition and motives, that oversight is commonly practiced for the protection of cargo or ship from certain kinds of damage.

The motivation of the *Turner* court is summed up in its statement that Congress could not have "meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy." 651 F.2d at 1304. The longshoreman was not left "to the mercies of foreign stevedores," but was the beneficiary of a most liberal compensation system as a result of the

[13] Custom is not a mere practice followed by some people, or by all people sometimes, or for a private purpose. It is a "usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates." *Blacks Law Dictionary* 385 (6th ed. 1990); *accord*, 21A *Am. Jur.2d*, CUSTOMS & USAGES § 1; 25 *C.J.S.* CUSTOMS & USAGES § 2. It "must, in order to be valid, be ancient, reasonable, and generally known . . . and also be certain . . ." *United States v. Buchanan*, 49 U.S. (8 How.) 83, 102 (1850). "[C]ertainly a custom relied upon to take the place of a settled principle of law, and therefore to have the force of law, ought to be as definite and specific in negativing the principle as the law which it assumes to supplant is in affirming it." *Federal Reserve Bank v. Malloy*, 264 U.S. 160, 171 (1924). The witness who proves it must show a foundation of knowledge of the existence of its elements, that is, not only its nature but its antiquity, its geographical or trade scope, the fact that it is generally known, the fact that it is uniformly practiced and the fact that it is regarded as obligatory. *See Oelricks v. Ford*, 64 U.S. (23 How.) 49 (1860).

1972 Amendments,[14] and the contest was, in economic reality, about whether the employer or the shipowner would support that compensation.

C. The Ninth Circuit Panels Have Improperly Formulated a General Rule on the Circumstances of an Individual Case Without Regard for its Impact and Practicality or for Sound Social Rulemaking.

There are no perfect rules for allocating burdens according to fault. Good legal and social policy recognizes that a fault-based system is not a satisfactory way of distributing casualty costs within an industry. This is recognized in elaborate cross-indemnity provisions by which employers contract with each other (especially in the petroleum industry)[15] to carry the costs of their own employees' injuries, regardless of faults. We see it mainly in workers' compensation laws, where the employer's normal burden is modified on the basis of fault through third-party suits but insulation from liability is provided for other entities involved in the same job or enterprise. The Longshore Act is an example of just such a scheme, placing the burden on the employer as the norm and permitting it to be shifted on the basis of fault, according to rules framed to provide practical industry guidance, easy recognition of responsibility and a minimum of litigation. The Act, as read by this Court in *Scindia*, makes the most practical division of responsibility between

[14] Apart from medical coverage, the Act provides for weekly compensation at ⅔ of a worker's average annual wage, not exceeding 200% of the average annual weekly wage. 33 U.S.C. § 906, 908. This maximum was expected to enable about 90% of the work force covered by the Act to receive fully ⅔ of their average weekly wage. Sen. Rep. No. 92-1125, 92d Cong., 2d Sess. The maximum, obviously reached in areas of high wages, is reported, as of October 1, 1993, to be $738.30. It is tax-free under 26 U.S.C. § 104(a)(1).

[15] *See, e.g., Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 633-35 (5th Cir. 1983).

the stevedoring segment and the carrying segment of the industry.

In *Scindia*, Justice Powell, joined by Justice Rehnquist, stressed the importance of avoiding rules under which "negligent stevedores would be receiving windfall recoveries in the form of reimbursement for the statutory benefit payments made to the injured longshoremen (footnote omitted)." 451 U.S. at 181. In *Turner*, the court stated that this view had "no relevance to the case before us," because the discharging stevedore "could not have prevented this accident by any exercise of care," by which it referred to the fact that the defect was absolutely concealed from those working over it. 651 F.2d at 1304. In *Riggs*, the court ignored that factor, blandly cited the other grounds of the *Turner* decision, and stated that they all were equally applicable to an obvious defect. 8 F.3d at 1447. It is bad enough to make a general rule on the peculiar facts of a case, without escalating it by denying the relevance of the fact that gave rise to it. If the concern of Justices Powell and Rehnquist had indeed no relevance in a case where the defect was concealed, that ceased to be so when the defect became obvious in *Riggs*.

In reality, however, the concern of the Justices was not irrelevant to the rule the *Turner* court was laying down. While the stevedore might not be expected to guard against the hazard in *Turner*, it is certainly not shown to be true that the care and vigilance of stevedores does not prevent injury in many cases from hazards that are concealed until they are disclosed as work progresses. Such hazards include gaps in lower layers of cargo, slippery decks, loosened boards or beams, unstable stacks and broken bands or packages. Reported cases afford illustrations of these and others that can be effectively countered by careful attention to surroundings, care in walking, laying of dunnage, temporary

shoring and so on.[16] All these hazards, though concealed at an early stage, lie within the range of those to be anticipated by the stevedore and described in *Hugev* as the premise on which this Court's turnover rule was formulated.

The rule for which Petitioner argues, and which the Ninth Circuit panels have by verbalism developed and extrapolated from concealment to obviousness, would apply to almost all the cargo discharged in the seaports of this country and seriously implicate the expressed concern of Justices Powell and Rehnquist about the windfall recoveries of stevedores in cases like this.

III. THE DECISION BELOW IS CONSISTENT WITH *SCINDIA* AND THE 1972 AMENDMENTS SINCE IT PLACES PRIMARY RESPONSIBILITY FOR SAFETY IN CARGO OPERATIONS ON THE STEVEDORE.

The premises on which we urge the Court to found its decision are these.

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[16] In the reported cases, conditions that were concealed until revealed in the course of operations appeared more frequently before the abolition in 1972 of the warranty of seaworthiness and stevedore indemnity. *See, e.g., Nuzzo v. Rederi A/S Wallenco*, 304 F.2d 506 (2d Cir. 1962) (holes in underlying cargo layers to be anticipated); *Hugev v. Dampskisaktieselkabet International*, 170 F. Supp. 601, 609-10 (S.D. Cal. 1959), *aff'd and adopted*, 274 F.2d 875 (9th Cir. 1960) (misplaced queen beam and unstable hatch boards under foreign cargo); *Amerocean S.S. Co. v. Copp*, 245 F.2d 291 (9th Cir. 1957) (non-apparent slippery condition of oiled deck); *American President Lines v. Marine Terminals Corp.*, 234 F.2d 753 (9th Cir. 1956) (absence of beam lock visible after partial discharge); *Borm v. Cunard S.S. Co.*, 367 F. Supp. 389 (S.D. Tex. 1973) (lack of locking pin in rail stanchion a latent defect brought into play by negligent stevedore operations); *Williams v. Lehigh Valley R.R. Co.*, 151 F. Supp. 809 (S.D. N.Y. 1957) (bad dunnage and poor illumination).

The scope of the turnover duty necessarily incorporates the rule of *Scindia*. It is a single, unified standard, not varying in nature by the obvious or concealed character of the condition, and is limited by the ship's rightful expectation that a stevedore contractor, as the party in general best positioned to do so, will discover, and avoid or correct, potential hazards in cargo stowage conditions as well as the condition of the ship and her equipment.

Under *Scindia*, the shipowner has no general duty to supervise or inspect the loading stevedore's operations, and it would be unreasonable to expect it, in turning over its vessel to a discharging stevedore, to represent that the cargo stow is free of potential hazards. Imposing a vessel duty to inspect or supervise in a foreign port would eviscerate the essential rule of *Scindia* and impose liability on a shipowner for stevedore fault, contrary to the intent of the 1972 Amendments.

This is not to say, however, that a vessel may have no duty at all with regard to a pre-existing condition in the cargo stow. Circumstances may arise, however exceptional, where a vessel has actual knowledge of a serious cargo stow hazard which it cannot expect an expert stevedore, with vigilance and attention to the possibility of concealed dangers, to discover and guard against. Under such circumstances, the ship's duty, despite the rule of *Scindia*, may require the vessel to act. Absent such circumstances, the *Scindia* rule allocates responsibility and risk to the stevedore to discover, avoid and, where practicable, correct hazardous conditions in the cargo stow. Failure to do so does not leave the injured longshoreman without a remedy, since he enjoys the benefit of liberal compensation payments.

Applying these legal principles to Petitioner's case mandates affirmance of the decision below. Certainly, in the absence of evidence that the shipowner knew of the use of plastic on the deck under the cargo, and knew that this

common material presented a hazard in the face of which the discharging stevedore could not "carry on its cargo operations with reasonable safety," the judgment should be affirmed.

CONCLUSION

For the foregoing reasons, we submit that the Court should affirm the judgment below and, in doing so, reaffirm the breadth of *Scindia*, which, since it was handed down, has greatly clarified responsibilities of ships and stevedores for the compensation of injuries and greatly reduced litigation in the courts to fix that responsibility.

Respectfully submitted,

GRAYDON S. STARING

JOHN A. FLYNN

Attorneys for Amicus Curiae
American Institute of Merchant
Shipping